

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

GARY PIERCE, Chairman
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SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

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Arizona Corporation Commission
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In the matter of)
)
SEED CORPORATION, an Arizona)
Corporation dissolved by administrative)
action;)
)
RANDALL DUANE SIMONSON and)
MARILYN J. SIMONSON, husband and wife;)
)
KARL HENRY REHBERG a/k/a SHAWN)
PIERCE, and HELEN REHBERG a/k/a LISA)
PIERCE, husband and wife)
)
Respondents.)

DOCKET NO. S-20844A-12-0122

**SECURITIES DIVISION'S
MOTION TO ALLOW
TELEPHONIC TESTIMONY**

(Assigned to Administrative Law Judge
Marc E. Stern)

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present telephonic testimony of prospective Division witnesses during the hearing of the above-referenced matter beginning on November 26, 2012. Seed Corporation investor Edward E. Welday and/or his daughter Karen Whiteside are expected to be called to testify regarding their respective communications with Respondents, Mr. Welday's investment and related documents.

This request is submitted on the grounds that, although these individuals can provide testimony that will provide relevant information at this administrative hearing, special circumstances prevent their actual appearance in Phoenix, Arizona, during the course of this proceeding.

For this primary reason, and for others addressed in the following Memorandum of Points and Authorities, the Securities Division's Motion to Allow Telephonic Testimony should be granted.

MEMORANDUM OF POINTS AND AUTHORITIES**I. Introduction**

The Division anticipates calling Edward E. Welday and/or Karen Whiteside as central witnesses to this hearing. The witnesses can provide probative testimony that supports a number of the allegations brought by the Division. The task of traveling to Phoenix to provide testimony in person, however, is impractical for Mr. Welday because he is eighty-five years old and resides in St. David, Arizona. Ms. Whiteside resides in La Quinta, California and her consulting business would be adversely affected if she were required to travel to Phoenix to provide her testimony. The simple and well-recognized solution to this problem is to permit them to testify telephonically. Through this manner, not only will relevant evidence be preserved and introduced, but all parties will have a full opportunity for questioning, whether by direct or cross-examination.

II. Argument**A. The use of telephonic testimony in administrative hearings is supported by administrative rules and court decisions.**

In administrative cases like this one, “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965). Procedural due process requires confrontation and cross-examination. The courts have acknowledged that telephonic testimony in administrative proceedings is permissible and consistent with the requirements of procedural due process. See e.g., *T.W.M. Custom Framing v. Industrial Comm’n of Arizona*, 198 Ariz. 41, 6 P.3d 745 (App. 2000).

The courts have also held that the Arizona Rules of Civil Procedure do not necessarily preclude telephonic testimony. See *In re MH 2004-001987*, 211 Ariz. 255, 258-59, 120 P.3d 210, 213-14 (App. 2005); *Arizona Dep’t of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997) (citing *Murray v. Murray*, 894 P.2d, 607, 608 (Wyo. 1995) (holding an

1 appearance by conference call meets the constitutional requirement of a meaningful opportunity
2 to be heard)). In a civil case, “appearance by telephone is an appropriate alternative to personal
3 appearance.” *Valentine*, 190 Ariz. at 110, 945 P.2d at 831. While the fact-finder’s ability to
4 observe the demeanor of the witness is limited, “the fact-finder can at least consider the pacing of
5 the witness’s responses and the tenor of his voice” to determine the credibility of the witness.
6 *Sabori v. Kuhn*, 199 Ariz. 330, 332-33, 18 P.3d 124, 126-27 (App. 2001); *see also T.W.M.*
7 *Custom Framing*, 198 Ariz. at 48, 6 P.3d at 752 (noting “the telephonic medium preserves the
8 paralinguistic features such as pitch, intonation, and pauses that may assist [the fact-finder] in
9 making determinations of credibility”).

10 The Arizona Corporation Commission promulgated Rules of Practice and Procedure that
11 were intended to “be liberally construed to secure just and speedy determination of all matters
12 presented to the Commission.” *See* A.A.C. R14-3-101(B). The rules encompass the use of other
13 forms of testimony during administrative hearings: “In conducting any investigation, inquiry, or
14 hearing, neither the Commission, nor any officer or employee thereof shall be bound by the
15 technical rules of evidence, and no informality in any proceeding or in the manner of taking of
16 testimony shall invalidate any order, decision, rule, or regulation made, approved, or confirmed
17 by the Commission.” *See* A.A.C. R14-3-109(K).

18 The telephonic testimony request in the present case fits squarely within the tenor of these
19 holdings. The Division is seeking to introduce the telephonic testimony of witnesses that could
20 not otherwise appear in a Phoenix hearing room without causing undue hardship to the witnesses.
21 The prospective testimony of these witnesses will be “substantial, reliable and probative,” and
22 the use of telephonic testimony will meet all requirements of substantial justice. In other words,
23 evidence bearing on the outcome of this trial will not be barred and respondents will still have
24 every opportunity to question the witnesses about their testimony or about any exhibits discussed.

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B. The Arizona Corporation Commission has a well-recognized history of permitting telephonic testimony during the course of administrative hearings.

In light of the relaxed evidentiary and procedural rules governing administrative hearings in this state and because telephonic testimony does not jeopardize the fundamental fairness underlying these proceedings, this Commission has repeatedly recognized and approved the use of telephonic testimony in their administrative hearings to introduce probative evidence. *See, e.g., In the matter of Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553, *In the matter of Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of Yucatan Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Forex Investment Services Corporation et al.*, Docket No. S-03177A-98-0000.

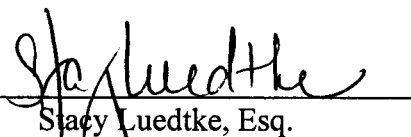
Accordingly, granting leave to introduce the telephonic testimony of the Division's prospective witnesses is consistent with past determinations in administrative hearings before the Commission.

III. Conclusion

Permitting these two witnesses to testify telephonically at the upcoming administrative hearing will allow the Division to present relevant witness evidence that is expected to be reliable and probative, is fundamentally fair, and does not compromise Respondents' due process rights. Therefore, the Division respectfully requests that its motion for leave to present such telephonic testimony be granted.

RESPECTFULLY SUBMITTED this 15th day of November, 2012.

By



Stacy Luedtke, Esq.

Attorney for the Securities Division of the
Arizona Corporation Commission

1 **ORIGINAL** of the foregoing and 8 copies
2 filed this 15th day of November, 2012, with:

3 Docket Control
4 Arizona Corporation Commission
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7 **COPY** of the foregoing hand-delivered this
8 15th day of November, 2012, to:

9 Administrative Law Judge Marc E. Stern
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14 **COPY** of the foregoing mailed this 15th day
15 of November, 2012, to:

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